Eagaivallinayagi Ammal v Chin Min Hua & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(W)-1436–07 OF 2017
DAVID WONG, ABANG ISKANDAR AND HASNAH MOHAMMED JJCA
23 JANUARY 2020

Contract — Specific performance — Sale and purchase of land — Buyer's estate settled balance 90% of purchase price 11 years after his death and 17 years after sale and purchase agreement ('SPA') was signed — Whether buyer guilty of gross inordinate unexplained delay — Whether even if buyer was not obliged to pay balance purchase price until seller delivered up duly executed memorandum of transfer buyer was still not entitled to specific performance on account of limitation and laches — Whether buyer and his estate had not shown readiness and ability to pay balance purchase price at all material times — Whether court would not grant specific performance if its grant unjustly enriched or gave unfair advantage to plaintiff and caused undue hardship to defendant — Whether seven-fold appreciation in market value of land more than 20 years after SPA signed made it unjust to grant buyer specific performance based on the SPA price — Specific Relief Act 1950 s 21(1)

On 25 May 1996, the respondents' father ('the buyer') entered into an agreement ('SPA') with the appellant, as attorney of a landowner, to buy a piece of land for RM213,673.60. The sale was subject to the buyer: (a) paying 10% deposit of the purchase price upon signing of the SPA; (b) paying RM20,000 into his solicitor's client's account on or before 23 August 1996 (to be used to compensate squatters occupying the land); and (c) paying the balance purchase price to his solicitor on or before 21 August 1996 with an extended period of 30 days with interest. The buyer only paid the 10% deposit and failed to perform the other two aforesaid conditions. On 27 June 2001, the appellant gave notice of termination of the SPA to the buyer who died a year later. It was only in 2013, ie, 17 years after the date of the SPA, that the buyer's estate paid the RM20,000 and the balance purchase price into the buyer's solicitor's client's account. The respondents then sued the appellant for specific performance of the SPA. The appellant counterclaimed for an order that a private caveat entered on the land by the respondents be removed and that they pay her damages for the entry of the caveat. The High Court allowed the respondents' claim and dismissed the counterclaim. The court found that the appellant had breached a fundamental term of the SPA in not delivering up a duly executed memorandum of transfer ('MOT') to the buyer's solicitor; that the obligation to pay the balance purchase price only arose after the duly executed MOT had

been so delivered up; and that the SPA continued to subsist as both parties by their conduct had not regarded time to be of the essence of the contract. The High Court also ruled that the respondents' cause of action against the appellant accrued when the appellant terminated the SPA and since the respondents' claim was filed on 3 December 2009, it was well within the 12 year limitation period for recovery of land under s 9 of the Limitation Act 1953. Although the court acknowledged that there was considerable delay on the buyer's part in performing his obligations under the SPA, it held that laches did not apply to defeat the respondents' claim as the appellant was not detrimentally affected by the delay. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal, setting aside the High Court's decision, allowing the counterclaim and ordering the MOT to be executed within 30 days:

(1) The trial judge was plainly wrong in his decision. The circumstances of the case did not justify a decision in favour of the respondents as they failed to adduce evidence that could have supported the granting of equitable relief in their favour. The respondents' claim was defeated by limitation as well as by laches. Even on the merits, their evidence fell short in that they failed to evince a financial capability to pay up the balance of the purchase price. A reasonable judge, similarly circumstanced as the trial judge, would not have granted the claim for specific performance (see para 41).

(2) It was clear from the evidence that the appellant had breached the agreement at least twice. Those breaches were concerned with her failure to surrender the MOT to the buyer. The first breach happened on 21 August 1996 and the second one on 21 October 1996. The accrual of the respondents' right to sue the appellant was triggered on either of those two dates in 1996. It did not happen in 2001 as was submitted by the respondents. As such, since the respondents' action was filed only in 2009, it was well past the limitation period of 12 years under s 9(1) of the Limitation Act 1953 (see para 20).

(3) Laches also denied the respondents of their claim. The gross delay, both in respect of the payment of the RM20,000 for the removal of squatters from the land as well as in the payment of the balance purchase price, was unexplained. The delay had prejudiced the appellant, especially in the preparation of her defence. The appellant's solicitor was unable to show proof of a certain document because the Bar Council Rules required a solicitor to keep the records of a transaction for only up to a period of 12 years from the date of the transaction. The rationale behind this principle was that it recognised that an adversary could lose evidence, witnesses and a fair chance to defend himself after the inevitable passage of time from

the date an alleged wrong or breach was committed. Equity could not assist the respondents who were clearly indolent. Both the conditions of payment — of the RM20,000 and the balance purchase price — were only paid into the buyer's solicitor's client's account 17 years after the due date, and in the case of the balance purchase price, the monies were never released to the appellant for more than 21 years. In the circumstances, it was grossly unfair to order the appellant to perform her side of the bargain when the buyer had evinced no clear intention on his part to close the deal in his favour. Although the trial judge found as a fact that the respondents did not offer any plausible or tenable explanation for the obvious and inordinate delay, instead of holding them accountable for such delay, the trial judge blamed the appellant for doing nothing (see paras 21–22, 24–26 & 28).

(4) Even on the merits, the respondents failed to show cogent evidence that the buyer was ready and able to pay the balance of the purchase price during his lifetime. The respondents also, like the buyer, were not in a position to pay up the balance purchase price. Even when the respondents filed their suit in 2009, no payment of the balance purchase price was made, not even to their solicitor. The value of the land in the instant case had appreciated to about RM1.5m in the 20 years after the date of the SPA. To compel the appellant to sell at the original price would cause her severe hardship while unjustly enriching the respondents who had allowed the SPA to lapse and paid the balance purchase price 17 years late. Pursuant to s 21(1) of the Specific Relief Act 1950, the court had to judiciously exercise the discretion to grant specific performance. Specific performance would not be granted if by doing so the plaintiff would receive an unfair advantage and the defendant would suffer undue hardship (see paras 30, 33 & 35–36).

[Bahasa Malaysia summary

Pada 25 Mei 1996, bapa responden ('pembeli') telah memasukki suatu perjanjian jual beli ('PJB') dengan perayu, sebagai peguam kepada pemilik tanah, untuk membeli sebidang tanah dengan harga RM213,673.60. Penjualan tersebut tertakluk kepada pembeli: (a) membayar deposit 10% dari harga belian setelah menandatangani PJB; (b) membayar RM20,000 ke dalam akaun anak guam peguam beliau pada atau sebelum 23 Ogos 1996 (akan digunakan untuk memberi ganti rugi kepada setinggan yang menduduki tanah); dan (c) membayar baki harga belian kepada peguam beliau pada atau sebelum 21 Ogos 1996 dengan tempoh lanjutan 30 hari beserta faedah. Pembeli hanya membayar deposit 10% dan gagal melaksanakan dua syarat lain di atas. Pada 27 Jun 2001, perayu memberikan notis penamatan PJB tersebut kepada pembeli yang meninggal dunia setahun kemudian. Hanya pada tahun 2013, iaitu, 17 tahun selepas tarikh PJB tersebut, pembeli melalui harta pusaka membayar RM20,000 dan baki harga belian ke dalam akaun anak guam

peguam pembeli. Responden kemudian menyaman perayu untuk perlaksanaan tertentu PJB tersebut. Perayu membuat tuntutan balas untuk suatu perintah supaya kaveat persendirian dimasukkan ke atas tanah oleh responden dibatalkan dan mereka membayar ganti rugi kerana kemasukkan kaveat tersebut. Mahkamah Tinggi membenarkan tuntutan responden dan menolak tuntutan balas tersebut. Mahkamah mendapati bahawa perayu telah melanggar terma asas PJB tersebut kerana tidak menyerahkan memorandum pindahmilik ('MPM') yang telah ditandatangani kepada peguam pembeli; bahawa kewajipan untuk membayar baki harga beliau hanya timbul setelah MPM yang telah ditandatangani telah diserahkan; dan bahawa PJB terus wujud kerana kedua-dua pihak melalui tingkahlaku mereka tidak menganggap masa sebagai inti pati kontrak. Mahkamah Tinggi juga memutuskan bahawa kausa tindakan responden terhadap perayu bermula ketika perayu membatalkan PJB dan memandangkan tuntutan responden telah difailkan pada 3 Disember 2009, ianya adalah masih dalam had masa 12 tahun untuk mendapatkan kembali tanah di bawah s 9 Akta Had Masa 1953. Walaupun mahkamah mengakui bahawa terdapat kelewatan yang lama daripada pihak pembeli dalam melaksanakan kewajibannya di bawah PJB, ianya diputuskan bahawa laches tidak berlaku untuk menolak tuntutan responden kerana perayu tidak terkesan oleh kelewatan tersebut. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membenarkan tuntutan balas dan memerintahkan MPM dilaksanakan dalam masa 30 hari:

(1) Hakim bicara jelas terkhilaf dalam keputusannya. Keadaan kes tersebut tidak membenarkan keputusan yang memihak kepada responden kerana mereka gagal memberikan keterangan yang dapat menyokong pemberian relif yang setimpal untuk mereka. Tuntutan responden dikekang oleh had masa dan juga laches. Walaupun berdasarkan merit, keterangan mereka gagal kerana mereka gagal membuktikan kemampuan kewangan untuk membayar baki harga belian. Seorang hakim yang wajar, sama seperti hakim bicara, tidak akan membenarkan tuntutan untuk perlaksanaan tertentu (lihat perenggan 41).

(2) Jelas daripada keterangan bahawa perayu telah melanggar perjanjian sekurang-kurangnya dua kali. Pelanggaran tersebut berkaitan dengan kegagalannya menyerahkan MPM kepada pembeli. Pelanggaran pertama berlaku pada 21 Ogos 1996 dan yang kedua pada 21 Oktober 1996. Pengakruan hak responden untuk menyaman perayu telah bermula pada salah satu daripada kedua-dua tarikh tersebut pada tahun 1996. Ia tidak berlaku pada tahun 2001 seperti yang dihujahkan oleh responden. Oleh itu, kerana tindakan responden hanya difailkan pada tahun 2009, tindakan tersebut telah melewati tempoh had masa 12 tahun di bawah s 9(1) Akta Had Masa 1953 (lihat perenggan 20).

(3) *Laches* juga menolak responden daripada tuntutan mereka. Kelewatan tersebut, baik dari segi pembayaran RM20,000 untuk penyingkiran setinggan dari tanah dan juga pembayaran baki harga belian, tidak dapat dijelaskan. Kelewatan itu telah memberi kesan buruk kepada perayu, terutama dalam menyiapkan pembelaannya. Peguamcara perayu tidak dapat menunjukkan bukti dokumen tertentu kerana Aturan Majlis Peguam mewajibkan peguamcara menyimpan rekod transaksi hanya selama 12 tahun dari tarikh transaksi. Alasan di sebalik prinsip ini adalah bahawa ia mengakui bahawa lawan boleh kehilangan bukti, saksi dan peluang yang adil untuk membela diri setelah berlalunya waktu yang tidak dapat dielakkan dari tarikh berlakunya kesalahan atau pelanggaran. Ekuiti tidak dapat membantu responden yang jelas malas. Kedua-dua syarat pembayaran — dari RM20,000 dan baki harga belian — hanya dibayar ke dalam akaun anak guam peguam pembeli 17 tahun selepas tarikh luput, dan dalam hal baki harga belian, wang tidak pernah dilepaskan kepada perayu selama lebih dari 21 tahun. Dalam keadaan seperti itu, sangat tidak adil memerintahkan perayu untuk melaksanakan tanggungjawab mereka apabila pembeli sendiri tidak mempunyai niat yang jelas untuk menyempurnakan perjanjian yang memihak kepadanya. Walaupun hakim bicara mendapati fakta bahawa responden tidak memberikan penjelasan yang masuk akal atau boleh dipercayai untuk kelewatan yang jelas dan berlebihan, selain beranggapan bahawa mereka bertanggungan atas kelewatan tersebut, hakim bicara telah menyalahkan perayu kerana tidak melakukan apa-apa (lihat perenggan 21–22, 24–26 & 28).

(4) Walaupun berdasarkan merit, responden gagal menunjukkan keterangan yang meyakinkan bahawa pembeli sudah bersedia dan mampu untuk membayar baki harga belian semasa hayat beliau. Responden juga, seperti pembeli, tidak berada dalam posisi untuk membayar baki harga belian. Walaupun responden memfailkan tuntutan mereka pada tahun 2009, tidak ada pembayaran baki harga belian dibuat, juga tidak kepada peguam mereka. Nilai tanah dalam kes semasa juga meningkat kepada kira-kira RM1.5 juta dalam 20 tahun selepas tarikh PJB. Untuk memaksa perayu untuk menjual pada harga asal akan menyebabkan kesukara yang teruk kepada beliau sambil memberikan pengkayaan yang tidak wajar kepada responden yang telah membiarkan PJB luput dan membayar baki harga pembelian lewat 17 tahun. Berdasarkan s 21(1) Akta Relief Spesifik 1950, mahkamah harus dengan bijaksana menggunakan budi bicara untuk membenarkan perlaksanaan tertentu. Perlaksanaan tertentu tidak akan dibenarkan sekiranya dengan melakukannya plaintif akan mendapat keuntungan yang tidak adil dan defendan akan mengalami kesulitan yang tidak wajar (lihat perenggan 30, 33 & 35–36).]

Cases referred to

Gan Realty Sdn Bhd & Ors v Nicholas & Ors [1969] 2 MLJ 110 (refd)
Henderson v Foxworth Investments Ltd and another [2014] 1 WLR 2600, SC (refd)
Lamare v Dixon (1873) LR 6 HL 414, HL (refd)
Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors [2017] 5 MLJ 63, CA (refd)
Loh Koon Moy & Anor v Zaibun Sa binti Syed Ahmad [1978] 2 MLJ 29, FC (distd)
Mohamad v Ho Wai [1961] MLJ 7 (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors [1998] 1 MLJ 589; [1997] 5 CLJ 428, HC (refd)
Ponnusamay & Anor v Nathu Ram [1959] MLJ 86, CA (refd)
Schwabacher, Re, Stern v Schwabacher, Koritschoner's Claim (1907) 98 LT 127 (refd)
Ryan v Mutual Tontine Westminster Chambers Association [1893] 1 Ch 116, CA (refd)
Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd (formerly known as Gagnar Bio-Tech (M) Sdn Bhd) [2014] 6 MLJ 77, CA (refd)
Waring and Gillow Ltd v Thompson (1912) 29 TLR 154, CA (refd)
Zaibun Sai bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92, PC (refd)

Legislation referred to

Contracts Act 1950 s 56(1)
Limitation Act 1953 ss 6(6), 9, 9(1),
Specific Relief Act 1950 ss 11, 11(2), 21(1)

Appeal from: Civil Suit 22–761 of 2009 (High Court, Penang)

Darshan Singh (Manjit Singh Gill with him) (Darshan, Syed, Amarjit & Partners) for the appellant.
Sunita Shalini Sankey (Vincent Tey Wei Seng with her) (Jublin Tan &Tey) for the respondents.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE/CASE FOR THE PLAINTIFF

[1] Chin Min Hua, Chin Ah Bah @ Chin Min Heng, Chin Min Hook are the plaintiffs in this case ('the plaintiffs'). The plaintiffs' father ('the purchaser') entered into a sale and purchase agreement ('said agreement') with Eagaivallinayagi Ammal ('the defendant') (being the attorney to the landowner, one Selvarajah a/l Ratnam) to purchase a piece of land situated at

Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai, Pulau Pinang ('the said land') on 25 May 1996 for a sum of RM213,673.60.

[2] The condition precedents pursuant to the said agreement to effect the sale are:

(i) the deposit sum of RM21,367.36 was to be paid upon execution of the said agreement;

(ii) RM20,000 to be deposited into the client's account of the purchasers' solicitors as a stakeholder (in order to compensate the squatters) an or before 23 August 1996; and

(iii) the final balance purchase price of RM172,306.24 to be paid to the purchasers' solicitors on or before 21 August 1996 with an extended period of 30 days ie up to 21 September 1996 was given to the purchaser provided an interest sum of 9%pa paid.

[3] The purchaser paid the sum of RM20,000 on signing the said agreement, pursuant to para (ii) above on 22 September 2013 ie 17 years after due date and on para (iii) was paid onto the purchasers' solicitors client account 17 years after the due date and the monies were never released to the vendor for more than 21 years despite the purchasers having transferred the ownership of the land in year 2013.

[4] The plaintiffs, being the children of the late purchaser have brought this claim to the Penang High Court after the demise of the purchaser for specific performance of the said agreement ie after almost 14 years from the date of the said agreement.

[5] The defendant on the other hand, filed a counterclaim for an order, among others, that the private caveat entered by the plaintiffs on the land be removed and for damages arising from the lodgement of the said caveat.

AT THE HIGH COURT

[6] At the High Court, the court found the issues to be determined as follows:

(a) whether or not the memorandum of transfer ('MOT') was delivered to the purchaser's solicitor as per the terms of the said agreement;

(b) whether the plaintiffs are entitled to the relief of specific performance of the said agreement and such other consequential relief arising there from;

(c) whether the plaintiffs' claim is barred by limitation and/or doctrine of laches; and

(d) whether the defendant is entitled to terminate the said agreement, forfeit the 10% deposit and be entitled to retain ownership of the property under the said agreement.

[7] After a full trial, the plaintiffs' claim was allowed by the court and the defendant's counter claim was dismissed. In finding so, the court held, among others:

(a) in respect of the MOT issue, the court found that the defendant failed to produce any evidence of the service letter showing any acknowledgement of service of the MOT. The defendant had in failing to deliver and/or prove that such service of the MOT was made to the plaintiffs' solicitor, breached the fundamental terms of the said agreement;

(b) on the time is of the essence issue, the court found that based on the facts of the case, time has been made the essence of the contract pursuant to cl 14 of the said agreement. That being the case, s 56(1) of the Contracts Act 1950 should be invoked which provides that failure to perform within a fixed time in a contract, where time is essential, would render the contract voidable. However, neither the purchaser nor the defendant rescinded the said agreement and had treated the contract as subsisting;

(c) in absence of either parties' intention to rescind the said agreement upon breach by the defendant, the said agreement remained in existence and that the time as stipulated in the said agreement ceases to be of essence of the said agreement and becomes at large;

(d) on the issue of limitation, the court held that pursuant to the terms of the said agreement, the purchaser's and/or plaintiffs' duty to make payment for the balance purchase price shall only arise upon delivery of the duly executed MOT of which the defendant failed to prove;

(e) the purchaser and/or plaintiffs had by conduct treated the said agreement as still subsisting. The defendant however failed to take any positive steps to issue a notice of demand for the balance purchase price from the purchaser, never requested for the RM20,000 to be paid to the squatters as stipulated under the said agreement and failed to issue any notice of termination after the expiry of the completion date;

(f) only on 27 June 2001 that the defendant instructed the solicitor to issue a notice of termination to the purchaser;

(g) the court found that the period of limitation can be said to have begun only from the first clear and unequivocal threat to the purchaser's right to the transfer of land that is on 27 June 2001;

(h) the plaintiffs claim filed on 3 December 2009 was well within the 12 years' period provided under s 9 of the Limitation Act 1953, and therefore not time-barred;

(i) the court also found that even there is considerable delay by the plaintiffs, the crucial factor to be determined is whether such delay has resulted in any acts which detrimentally affect particularly to the defendant. In this respect, no steps have been taken by the defendant to deal with the property. There was no evidence of disposition to a third party;

(j) the court held that it does not appear to be a case where laches would apply so as to defeat the plaintiffs' claim. There was delay on the part of the plaintiffs, however nothing was done by the defendant which resulted in a disposition of the property;

(k) on the specific performance itself, the court found that where a valid contract for the sale of immovable property and breach thereof proved, coupled with the fact that there is no allegation or evidence that the conduct of the plaintiffs' has been such as to disentitle them to the equitable relief sought, the conditions required for the presumption under s 11(2) Specific Relief Act 1950 ('the SRA') would be considered to be present; and

(l) the defendant failed to rebut the presumption under s 11(2) of the SRA.

THE APPEAL

[8] Dissatisfied with the High Court's decision, the defendant lodged an appeal against the said decision to the Court of Appeal. We had heard submissions by both learned counsel and we had also considered their written submissions.

[9] To recap, the issues before us, as articulated on behalf of the defendant were as follows:

(i) does the Defendant (as the Vendor) need to give notice in writing upon the expiry of the said Agreement; and

(ii) if the answer is in negative and a notice in writing as to the expiry is given after that expiry period would that constitute a waiver of the expiry period.

THE DELIBERATION

[10] During the appeal before us, the defendant raised two broad issues, the determination of which would effectively dispose of this appeal. One related to

the issue of laches and limitation, while the other related to the issue of notice which the defendant had given to the plaintiffs pertaining to the termination of the said agreement.

[11] We will deal with the second issue, namely on the notice, first. From our perusal of the evidence adduced during trial, the defendant sent the said notice to the plaintiffs on the 27 June 2001. This, in effect was about five years after the signing of the said agreement involving the subject property. The significance of this event in the scheme of things in the overall scenario had been that, as was submitted by the plaintiffs, such notice by the defendant must be taken as the effective date of termination of the said agreement by the defendant, which was allegedly illegal, thereby occasioning a breach by the defendant of the said agreement. Premised on that submission, the plaintiffs further submitted that their cause of action against the defendant accrued on that date. As such, as this action was filed in 2009, it was well was within the 12 years time frame. The learned trial judge had agreed with them and learned counsel for the plaintiffs had urged this court to also find that their action against the defendant was not caught by limitation. And it was the plaintiffs' submission as well that neither were they guilty of laches.

[12] Learned counsel for the defendant submitted that the notice of 27 June 2001 was an innocuous one and that nothing adverse ought to be interpreted as coming out of it. He alluded to the fact that time was of the essence as provided for under the said agreement. As there was no compliance on payment by the deceased purchaser, there was therefore no need for a termination notice. To the defendant, the issue of the notice had been a house-keeping exercise, as the defendant had not heard from the purchaser for years. Apart from the payment of the 10% deposit, there were no correspondences from the purchaser regarding the property for years. Actually, there was nothing emanating from the purchaser up to the time when he had passed away. During his lifetime, as was relevant to the said agreement, the purchaser never indicated his intention to the defendant that he was going to pay off the balance of the purchase price, let alone indicating to the defendant about his capacity, financially, to pay off the balance of the purchase price. In other words, there was no overt conduct on the part of the purchaser to evince a clear intention on his part to pay the balance of the purchase price of the subject property. In fact, when he died, the balance of the purchase price had remained unpaid to the defendant. It was after his demise that his estate through the plaintiffs proceeded to sue the defendant for specific performance of the said agreement from the defendant.

[13] Now, the defence of limitation and of laches are rather unique. We say so, because if either of these defences bites, the claim by the plaintiffs is defeated. The claim of the plaintiff is defeated not on account of the merits or

demerits of the claim, but rather, because as regards to limitation, statute has so provided that there should be a time limit as to how long a plaintiff can sit on his right to sue for reliefs against a party whom it sees as the cause of its misery. As regards laches, it is premised on the doctrine, grounded on equity, that similarly, a plaintiff who sits on his right without initiating an action against the wrong party, may have his belatedly filed suit dismissed due to unreasonable delay in asserting his rightful claim. Laches is thus, an equitable form of estoppels working against a claimant, based on unexplained and unjustified delay on the part of the claimant. As had been alluded to earlier, in both instances, where limitation and/or laches apply, it matters not that the plaintiff's suit may be highly meritorious. In other words, a perfectly strong case on its merits may not see full ventilation in court, as it is defeated by the unreasonable delay in pursuing a remedy in court (see, Sinnadurai, *The Sale and Purchase of Real Property in Malaysia* (Singapore, Butterworth, 1984) p 414. See also *Chitty on Contracts*, General Principles (25th Ed) Chapter 27. See also cases, namely *Schwabacher, Re, Stern v Schwabacher, Koritschoner's Claim* (1907) 98 LT 127; *Waring and Gillow Ltd v Thompson* (1912) 29 TLR 154; *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116. Spry, ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages* (2nd Ed 1980, Sweet & Maxwell, England) pp 4–5. Once, limitation by statute, or laches by equity sets in, just like the proverbial rigor mortis, it is irreversible. The belated action is dealt a mortal blow.

[14] As regards specific performance, according to s 11 of the SRA, it can be granted in matters pertaining to breach of contract to transfer immovable property where an award of damages is not a sufficient remedy (see *Zaibun Sai bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92 (PC)). Similarly, this relief could not also be granted in the executory contracts: *Mohamad v Ho Wai* [1961] MLJ 7 and where actual losses could not be ascertained: *Gan Realty Sdn Bhd & Ors v Nicholas & Ors* [1969] 2 MLJ 110.

[15] For the cause of action to accrue, there must have been a breach of the contractual duty. Cause of action also means 'a right to sue'. There cannot be 'right to sue' until and unless there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that the right of the defendant against whom the suit is instituted (see, the ratio of Alauddin Mohd Sheriff J (as he then was) in *Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors* [1998] 1 MLJ 589; [1997] 5 CLJ 428).

[16] Generally, a cause of action founded on a contract must be filed in court within six years from the date of the alleged breach thereof. Section 6(6) of the Limitation Act 1953 states as follows:

> ... the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[17] However, a cause of action for the recovery of land pursuant to a contract, has a limitation period of 12 years from the date when the cause of action accrues. The limitation period for action to recover land is 12 years pursuant to s 9(1) of the Limitation Act 1953. Section 9(1) of the Limitation Act 1953 provides that:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.

[18] The high authority for this proposition is found in the decision of the Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32 in relation to the limitation period of action for specific performance of contract of sale of land, where Gill FCJ had put this:

> It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

See also per Thompson CJ in *Ponnusamay & Anor v Nathu Ram* [1959] MLJ 86 where he said, inter alia:

> That reasoning leads me to the conclusion that this is an action to recover land within the meaning of s 9 of the Limitation Ordinance (No 4 of 1955). Having reached the conclusion that this is an action to recover land it seems to me impossible to avoid the further conclusion that the case falls within s 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case the action founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By s 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be twelve years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

[19] In this case, the defendant submitted that the purchaser should have taken action against her in August or October 1996 when she had allegedly breached the said agreement by failing to deliver the MOT to the purchaser within the time as stipulated in the said agreement. Those lapses would constitute the time when the cause of action had accrued in favour of the purchaser, to initiate action against the defendant. The ensuing paragraph would detail the factual matrix relevant to this submission by the defendant.

[20] As such, the crucial question had become: 'when did the plaintiffs' cause of action accrue against the defendant?' The law as stated above is clear. Going by the provisions under s 9(1) of the Limitation Act 1953 the 12 years had lapsed on 3 December 2009 when the plaintiffs filed in this action against the defendant for specific performance. In this case, it is rather clear from the evidence adduced that the defendant had breached the said agreement at least twice, and those breaches happened quite early into the transaction. Those breaches were concerned with the surrender of the memorandum of transfer to the deceased purchaser. The first breach happened on the 21 August 1996 and the second breach occurred 60 days later, namely on the 21 October 1996 when the defendant again failed to do the same. This must be so, as time was of the essence of the agreement as provided for under cl 14 of the said agreement, stipulated as follows: 'TIME OF THE ESSENCE' Time in respect of all acts and payments, wherever mentioned shall be of the essence of this Agreement'. The First Schedule, Part 10 of the said agreement expressly stipulated that the completion date is 90 days from the date of the said agreement, namely 23 May 1996. Part 15 of the same First Schedule stated that the extension period o he completion date is 60 days. The accrual of the plaintiffs' right to sue the defendant was triggered on either of the dates, which happened in 1996. It did not happen in 2001 as was submitted by the plaintiffs and which submission was erroneously accepted by the learned trial judge as the date of breach by the defendant. As such, since this action was filed by the plaintiffs only in 2009, it was well past the limitation period of 12 years, as provided for under s 9(1) of the Limitation Act 1953.

[21] Again, the doctrine of laches is relevant here. The doctrine acts to deny a claimant who sits on his right. A delay in itself may not necessarily be fatal. It is an unexplained delay that the court shuns upon. It causes prejudice against the defendant, especially in the preparation of his plausible defence. Indeed in this case, the solicitor for the defendant was not able to show documentary proof of a certain document because under the Bar Council Rules 18.01 a solicitor is required only to keep records of transaction for a period of up to 12 years from the date of the said transaction. The delay had caused prejudice to the defendant's cause. He had been disadvantaged by the plaintiffs' undue delay initiating their purported claim against him for specific performance. The rationale behind this principle is that it recognises that an adversary can lose evidence, witnesses, and a fair chance to defend himself after the inevitable passage of time from the date that the alleged wrong or breach was committed. Equity does not lend her hand to assist an indolent litigant. While equity assists the vigilant, definitely she does not assist those who slumber on their rights.

[22] We were in agreement with the defendant that the plaintiffs were such litigants. Hence the maxim, 'equity will not grant relief from a self-created hardship' applies against the plaintiffs.

[23] A perusal of the said agreement also yielded some salient features peculiar to it. These came in the form of condition precedents which, the deceased purchaser was obligated to fulfil as part of the said agreement to effect the said sale of the property, namely:

(i) the deposit sum of RM21,367.36 was to be paid upon execution of the said agreement;

(ii) RM20,000 to be deposited into the client's account of the purchasers' solicitors as a stakeholder (in order to compensate the squatters) on or before 23 August 1996; and

(iii) the final balance purchase price of RM172,306.24 to be paid to the purchasers' solicitors on or before 21 August 1996 with an extended period of 30 days ie up to 21 September 1996 was given to the purchaser provided an interest sum of 9%pa paid.

[24] As the uncontroverted facts of this case had shown, the purchaser only paid the sum of RM20,000 pursuant to para (ii) above on 22 September 2013, when in fact, as agreed and stipulated in said agreement, that sum should be paid on or before 23 August 1996. The lateness or delay on the part of the purchaser to comply with that condition is 17 years after due date.

[25] As regards, the payment of the balance of the purchase price of the property, it was only paid into the purchasers' solicitor's client account 17 years after the due date and the monies were never released to the vendor for more than 21 years.

[26] Under such circumstances as enumerated above, it would be grossly unfair to order the defendant to perform his side of the bargain to give effect to the said agreement when the purchaser had evinced no clear intention on his part to close the deal in his favour. Instead of acting with reasonable speed to effectuate the said agreement by complying with the pre-conditions that we had alluded to above, the purchaser had literally slept on his right by doing practically nothing to help himself to fulfil his part of the bargain. In fact, the learned trial judge found as a fact that the plaintiffs could not offer any plausible or tenable explanation for the obvious and inordinate delay, but instead of holding the plaintiffs accountable for such delay, the learned trial judge had gone on to blame the defendant for doing nothing (see, p 39 para 64 of the grounds of judgment (*rekod rayuan Jld* 1 — *Bahagian* A).

[27] In such glaring circumstances, it would be, to our minds, highly inequitable for the court to render equitable relief to the purchaser, who even in his own lifetime, had seen it fit not to reasonably pursue and prosecute his right under the said agreement. In fact, he was always very late in fulfilling his obligations under the said agreement.

[28] In these circumstances, we agreed with the defendant that laches had set in to deny the plaintiffs of their claims in respect of the property which their late father had intended to purchase from the defendant. In fact, limitation had also set in to bar the plaintiffs from claiming for specific performance against the defendant. The 12 years made available, under s 9(1) of the Limitation Act 1953 within which period of time the plaintiffs could file in their relief to recover the land had come and gone. As it had come to pass, the plaintiffs only sought to file in their claims against the defendant after the expiry of this period. In fact, the plaintiffs had, on the merits, failed to justify why an order for specific performance ought to be issued against the defendant, when the plaintiffs themselves failed to show, by way of evidence, that the deceased was at the relevant and material time, ready to fulfil his part of the bargain. It was very clear to us that there had been an unexplained delay on his part to comply with the payment of the RM20,000 for removal of squatters from the property and the late payment of the balance of the purchase price to the deceased purchaser's solicitor. In both instances, the inexplicable delay involved was nearly 20 years from the date of the execution of the said agreement.

[29] The remedy of specific performance being an equitable relief, the court had wide discretion which has to be exercised judiciously in that, in the context of this case, the deceased purchaser must show that he was not at fault, in the sense that his hands were not tainted with any blame which could be attributable to his own action, inaction or omission. The said agreement was executed in 1996. The purchaser died in 2002 and in between, he did nothing substantial that could be interpreted as evincing an intention to complete the purchase. If indeed, the purchaser had the financial means to pay for the balance of the purchase price, why did he not pay for the same? His conduct pointed more to support the opposite contention.

[30] Even on the merits, the plaintiffs had failed to show cogent evidence that the purchaser was ready and able to pay the balance of the purchase price of the subject property during his life time. It is a trite principle regarding specific performance, that a claimant seeking this kind of relief must adduce evidence to the effect that he had paid the balance of the purchase price as agreed in the said agreement between them. The court will not grant the claimant his prayer for specific performance if by so doing, it causes hardship on the part of the vendor.

[31] In the context of this case, we were with the defendant when his learned counsel submitted that the mere tendering of letter from the bank which had approved the bank loan could not discharge that onus on the deceased purchaser's ability to pay for the balance of the purchase price.

[32] Granted that the purchaser was given the right to institute an action for specific performance under cl 7(b) of the said agreement, that right must be exercised within legal limits as well as within accepted equitable principles with regards to timeliness as it is a relief grounded upon rules of equity which demand that one who comes before her must come with clean hands.

[33] The Court of Appeal in the case of *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors* [2017] 5 MLJ 63 found that specific performance will not be granted if damages could be awarded and the conduct of the plaintiff may disentitle from seeking specific performance. This case before us is a clear illustration as to why an order of specific performance ought not to be issued against the defendant. The deceased purchaser had, apart from having paid the initial deposit of RM21,367.36, done practically nothing that would evince a clear intention on his part to follow through with the said agreement with the defendant. Not only had months passed by, but years had gone by and still there was no evidence emanating from the purchaser having made the necessary inquiries from the defendant regarding the status of the land and the said agreement. Here, the plaintiffs only deposited the balance of the purchase price into their solicitors account on 2 September, 2013 after 17 years had passed, an obligation which the deceased purchaser was in fact supposed to discharge in 1996 itself, as per the said agreement. Not only has there been a gross delay, it also exhibited rather manifestly that the plaintiffs, not unlike their deceased father (the purchaser) were not in a position to pay up the balance of the purchase price. Even when the plaintiffs filed this suit in 2009, no payment of the balance of the purchase price was made, not even to their solicitor. In 1996, the price of the subject property was about RM200,000 (RM172,306.34 + RM21,367.36) but after about 20 years the value had increased to about RM1.5m, the latter figure being the evaluation carried out by Henry Butcher, a realty valuer. One can hardly blame the defendant that to allow specific performance would not only cause hardship to her, but that it would smack of unjust enrichment.

[34] In a claim seeking an equitable relief, a claimant cannot afford to exhibit any evidence of lax attitude and disinterestedness over longish period of time, only to suddenly wake up one fine morning and crying out for what he claims is his right.

[35] We were aware of the provisions of s 21(1) of the SRA in considering whether to grant specific performance, in that the discretion must be exercised judiciously. It must be ascertained that the plaintiff did not receive any unfair advantage, and that the defendant would not suffer undue hardship as a result of it being ordered to specifically perform the contract with the plaintiff.

[36] In this appeal before us the plaintiffs tried to procure a property after the time period in the said agreement having lapsed and paying the balance purchase price 17 years later is an unfair advantage as the value of the property having increased manifold and now to compel the property being sold at the original price has certainly created severe hardship to the defendant. In the circumstances, it would be manifestly unjust to grant specific performance in favour of the plaintiffs (see for example, the case of *Shirley Koh Gek Ngo & Anor v Tanah Emas Bio-Tech (M) Sdn Bhd (formerly known as Gagnar Bio-Tech (M) Sdn Bhd)* [2014] 6 MLJ 77).

[37] As regards the reliance by the learned trial judge on the Federal Court case of *Loh Koon Moy & Anor v Zaibun Sa binti Syed Ahmad* [1978] 2 MLJ 29 ('*Loh Koon May* case'), we agreed with learned counsel that the factual matrix that obtained in this case could be distinguished in that in that *Loh Koon May* case there was already an order of court empowering seller to sell the land, whereas in our present appeal, there was no such order is existence when the action was filed.

[38] It has been stated in *Lamare v Dixon* (1873) LR 6 HL 414 that as a matter of principle:

> The discretion to refuse specific performance is 'not an arbitrary ... discretion but one to be governed as far as possible by fixed rules and principles'.

OUR FINDINGS

[39] Coming back to the issues at hand, the answers to those questions, upon due perusal of the appeal records must be that the question (i) is answered in the negative. There was nothing in the said agreement imposed any burden or obligation on the defendant, as the vendor or landowner, to give any notice in writing upon the expiry of the said agreement. As to the question (ii), we agreed with the defendant that the fact that a notice in writing as to the expiry after the expiry period would not amount to a waiver of the expiry period. It goes without saying that these issues had direct impact on the issue of limitation.

[40] Upon due consideration of the overall evidence in this appeal, we were of the considered view that the plaintiffs had not brought themselves within the circumstances that would entitle them to the granting of specific performance in their favour, as prayed for by them. An appellate tribunal, such as this court, will only disturb and set aside a decision of a trial judge if a reasonable court, similarly circumstanced, would not have reached a decision of the trial judge now under scrutiny. Put differently, the postulation is thus: 'What matters is whether the decision under appeal is one that no reasonable judge could have reached' (see *Henderson v Foxworth Investments Ltd and another* [2014] 1 WLR 2600).

[41] In the circumstances, we found merits in the appeal of the defendant. The learned trial judge was plainly wrong in his decision. The circumstances in this case could not justify a decision in favour of the plaintiffs. The plaintiffs had failed to adduce evidence that could support a granting of equitable relief in their favour. Also, their claims had been defeated by limitation as well as by laches. On top of that, even on merits, their evidence had fallen short in that they failed to evince a financial capacity to pay up the balance of the purchase price. The learned trial judge had fallen into error when he acceded to their claims. In our considered view, a reasonable judge, similarly circumstanced as the learned trial judge in this case, would not have so decided the way he did in granting the specific performance.

CONCLUSION

[42] In the upshot, we had unanimously allowed the appeal by the defendant. The High Court order dated 9 June 2017 was set aside. The counterclaim was allowed wherein the caveat was to be removed and damages to be assessed by the judge. We also ordered that the transfer of the MOT to be executed within 30 days from the date of our decision, failing which, the senior assistant registrar is to execute the MOT. Costs of RM40,000 for here and below, subject to allocator fees and the deposit to be refunded.

Order accordingly.

Reported by Ashok Kumar